Supreme Court of the United States.

OCTOBER TERM, 1910.

MARIANO MARTINEZ, Administrator of Francisco Martinez, deceased, Appellant, *vs.* THE INTERNATIONAL BANKING CORPORATION.	No. 79.
MARIANO MARTINEZ, Administrator of Francisco Martinez, deceased, Appellant, *vs.* THE INTERNATIONAL BANKING CORPORATION.	No. 80.

Appeals from the Supreme Court of the Philippine Islands.

BRIEF FOR APPELLANT.

INTRODUCTORY STATEMENT.

These are appeals from two judgments of the Supreme Court of the Philippine Islands entered

on March 24th, 1908, (Rec., pp. 36, 103), reversing judgments entered on March 29th, 1906, in the Court of First Instance of the City of Manila in favor of the original defendant Francisco Martinez against the original plaintiff, The International Banking Corporation, and directing judgment absolute in favor of the plaintiff.

These two suits were tried together and constitute one litigation, as the result of No. 79 is necessarily determined by that of No. 80. The original defendant Francisco Martinez died after the appeals to this Court were taken, and his administrator was substituted. His guardian, the other defendant, has thus become *functus officio*. For the sake of brevity, we shall in this Brief refer to the original defendant, Francisco Martinez, simply as "the defendant," "the appellant" or "Martinez," and to the original plaintiff as "the Bank" or "the plaintiff."

Case No. 79 was a suit of an equitable nature brought by the Bank against Martinez to foreclose a mortgage upon the steamer Germana, sell the steamer, and collect an alleged debt of 30,000 pesos claimed to be secured thereby (see Complt., Rec., pp. 14, 15). The defendant, by answer and cross-bill, claimed that at the time of executing the mortgage he was mentally incapacitated and hence legally incompetent, that the whole transaction was void for fraud, duress and conspiracy, that the alleged indebtedness was a part of the subject matter of the instrument sued on in the other case (No. 80), which extinguished and superseded the instrument sued on in No. 79, and that the plaintiff had wrongfully taken and held possession of the steamer and refused to account

for its profits. He demanded as affirmative relief the setting aside of the whole transaction, the return of the steamer, and an accounting of its profits. (See Amd. Ans., Rec., pp. 15-19.)

The Court of First Instance in substance sustained these defences, dismissed the plaintiff's suit. and directed a return of the steamer (Rec., pp. 19-20).

The Philippine Supreme Court reversed this judgment, held that the transaction was valid, gave judgment for the plaintiff against the defendant in the sum of 28,599.13 pesos with interest at 8% from January 1st, 1904, and directed a sale of the steamer to satisfy the judgment. It noted, however, that the claim in suit was also involved in the other case, and observed that provision was made in the judgment therein against a double recovery. (See Rec., p. 32.)

Case No. 80 was a suit upon another instrument executed by Martinez in favor of the Bank, to provide for the payment of a claim stated to amount to 159,607.81 pesos. The complaint alleged this instrument to be in effect a mortgage upon the property to which it referred, and prayed for a foreclosure and sale to satisfy the alleged debt. (See Complt., Rec., pp. 47-49.) By answer and cross-bill the defendant set up the same defences as in No. 79; also that the alleged consideration for the instrument sued on was padded and fictitious, and contained duplications of the same item, and included the item of 30,000 pesos which was the subject of the other case; also that the instrument sued on was not in law a mortgage, but was an agreement for the transfer of property with right of repurchase (*pacto de retro*), and that the de-

fendant had never refused to perform such contract, but that the plaintiff had failed to perform its own obligations thereunder; also that the plaintiff had wrongfully taken possession of the property in question and received its rents and profits. The defendant demanded that the entire transaction be set aside; that plaintiff's suit be dismissed; and that plaintiff account for the rents and profits it had received. (See Second Amd. Ans., Rec., pp. 70-78.)

The Court of First Instance held that the whole transaction was the product of a conspiracy, of which the Bank's local manager Brown was one of the moving spirits, to defraud Martinez, who was at the time incompetent; that the Bank had notice of the facts through its manager; that the instrument sued on was not a mortgage, but a contract to convey; that plaintiff's only proper remedy would have been a suit for specific performance; and that the Bank must account for the rents and profits of the property of which it had wrongfully taken possession. Judgment was rendered in favor of the defendant for 29,281.92 pesos, being the amount of rents collected by the plaintiff, and also for the return of the possession of the property. (Rec., pp. 85-88.)

The Philippine Supreme Court reversed this judgment, holding that the agreement sued on was valid and enforceable, although not as a mortgage, and that Martinez was indebted to the Bank in the sum of 159,607.81 pesos, less certain rents, and directing Martinez to execute and deliver to defendant a conveyance, with right of repurchase, of the properties in question, except the steamer Germana, the judgment to contain a further provision that whatever might be realized

from the sale of the Germana in the other case should be considered as a partial payment on account of the amount adjudged to be due in this action. (Rec., pp. 96-99, 103.)

From these two judgments of the Philippine Supreme Court the present appeals have been taken.

Statement of Facts.

The circumstances and transactions out of which this litigation has arisen are complicated and obscure, and the evidence, both oral and documentary, is necessarily voluminous. So far as possible we wish to avoid imposing upon this Court the burden of examining into the labyrinthine details of the frauds practiced upon the defendant, and we shall endeavor to state only the most salient facts in their simplest outlines—enough to show the errors of the Court below, but no more.

This case is the sad and sordid story of the spoiling of a "prodigal father" in his helpless old age, by a gang of common swindlers, one of whom furnished the necessary machinery for the operations through the opportunity afforded to him by the plaintiff Bank as its local manager, with full control of its Manila branch (See Rec., p. 510).

Francisco Martinez, the original defendant, was a native of Balayan, Province of Batangas. (Rec., p. 315.) In the year 1902, or thereabouts, when he was about sixty-five years of age, his wife died. He was at this time a wealthy man, worth about 1,000,000 pesos, largely invested in

income-producing real estate in Manila. A large part of this property appears to have been "community property," requiring liquidation and division with his wife's estate. Some controversy arose on this subject, and his son Pedro brought suit against him. He also lost three children by death. (Rec., p. 323.) His mind shaken and unbalanced by all these troubles, the old man sought refuge and distraction in gambling. He soon exhausted his ready cash and began to give notes for his gambling debts. One of the people with whom and at whose house he gambled was Isidro Martinez, who testified in this case. In January, 1903, the defendant's funds being doubtless depleted, he asked Isidro Martinez to arrange for the opening of a credit for him with the plaintiff Bank. (Rec., p. 215.) Isidro Martinez called in the services of a Chinaman, Montilivano, the manager of a business house, and together they went to see Mr. Brown, the manager of the Bank. They afterwards exhibited evidences of Martinez's solvency, and Ricardo Regidor, who appears to have been employed by the Bank as a "credit-man", either generally or in this particular case, looked into the matter and reported favorably (Deft.'s Exh. 62, Rec., p. 432). A credit of 30,000 pesos was opened on January 20, 1903. (Rec., p. 215.) Heavy commissions were paid by Martinez for securing this accommmodation, 3000 pesos to Isidro Martinez and 600 pesos to the Chinaman, by cheques drawn against this credit. (Rec., p. 222.) Martinez continued to draw cheques against this account, many of them in favor of Isidro Martinez for gambling debts (Rec., pp. 216, 222). Soon after the opening of the credit, Isidro Martinez received a cheque

from the defendant dated January 30, 1903, for 1000 pesos, which he took to the Bank to get cashed. This was refused, and Isidro Martinez was referred by the Bank manager to Regidor, who "was taking charge of all these documents for the Bank" and who was the Bank manager's accomplice and agent. (Rec., p. 216.) This was apparently the first overt act of the conspiracy. Regidor said to Isidro Martinez: "As it is a gambling debt, you must reduce it 25%;" Isidro Martinez assented, the cheque was again presented, this time by Regidor, and was cashed at its face value; Isidro Martinez paying 250 pesos out of the proceeds to Regidor in the Bank manager's presence. (Rec., pp. 216, 217.) This proceeding was frequently repeated, with variations in the toll exacted by Regidor, always with Brown's knowledge and assent.

Further details of Regidor's introduction to the transaction are related by his former private secretary, Pedro Cantero. He had already "had transactions of discounting pagares" (promissory notes) in connection with Brown the Bank manager, and when Martinez first applied for his credit, the manager directed Regidor to investigate Martinez and his circumstances. Regidor did so, and upon his favorable report the account was opened (Rec., p. 139). From that time (the end of January, 1903), the manufacture of paper obligations of Martinez to the Bank was industriously carried on under the active direction of Brown the Bank manager, his accomplice Regidor, and the latter's handy-man Cantero. The last named appears to have held the pen, and actually prepared most of the instruments. He considered Martinez men-

tally incapacitated, because he would sign any paper presented to him, without knowing its contents, if only money were paid to him (Rec., p. 140). Nevertheless Cantero went on with the transactions, because there had been, as yet, no legal adjudication of incapacity (Rec., p. 141). Among the papers so executed was a most sweeping power of attorney to Cantero (Rec., pp. 335, 336). Cantero himself testified that Martinez "did not have any knowledge" of this power "until a long time afterwards, for that reason I did not want to make use of it when it was given to me" (Rec., p. 140).

Not satisfied with the profits accruing on the cheque transactions, the conspirators also searched out and bought up outstanding obligations of Martinez, invalid because for gambling debts, at a small fraction of their nominal amount, and charged them to his account at their face value (Rec., pp. 231, 344).

Once the old man was in their clutches, his spoilers played upon his fears and his credulity as well as his gambler's necessities. Regidor held the purse strings, and, by the order of Brown the Bank manager, no cheques were paid by the Bank without his leave (Rec., p. 282). Martinez would go to Regidor's house, and, upon the threats of Regidor and Brown, would sign whatever papers they presented to him, after vain efforts to refuse. He testified (Rec., pp. 282-283):

> Q. Who was it threatened you when you refused to sign the various documents?
>
> A. Mr. Regidor and Mr. Brown.
>
> Q. Tell the Court what they did and said and threatened.

A. Sometimes they told me that they would strike me, and other times that they would throw me out of the window. * * *

They told me that they would send me to Bilibid and that they would strike me. * * *

They usually told me that they knew God and would not deceive me and that everything they were doing was in my favor.

Q. Did you believe at that time what they said to you?

A. Yes, sir. Because they told me that they recognized God and that they would never deceive me. * * *

Q. Why did you believe what Brown said to you?

A. He said that he would never deceive me because he was acting according to the laws of God."

The first specific transaction which enters into the causes of action set up by the plaintiff is a loan claimed to have been made by the plaintiff to the defendant on May 2nd, 1903, to the amount of 30,000 pesos, secured by a pledge of a one-half interest in the steamers Germana and Don Francisco, afterwards changed to the entire interest in the Germana alone.

According to a memorandum made by the Bank manager in answer to a written enquiry from Regidor (Defts. Exh. 4, Rec., pp. 136, 343, 344), the supposed proceeds of this loan were accounted for by debiting Martinez' account on June 30, 1903, with the amount of three promissory notes to the total of 25,000 pesos, and paying 2,505 pesos for maritime insurance on July 28th. These notes were actually bought by Regidor from their holder for 1,000 pesos (See post, p. 39). This exhibit is one of the most significant documents in the case, showing as it does the relations be-

tween Regidor and the Bank manager, and their attitude towards their victim. Regidor writes: (Rec., p. 343):

> "The escritura of the prodigal I entrusted to Gutierrez, who has not understood the same, and I am making it myself. There are no difficulties. *The prodigal is very well disposed towards the bank.*
>
> * * * * * * *
>
> I desire that you inform me how you have proceeded in your books with reference to the loan of 30,000 pesos guaranteed by the Germana and Don Francisco. Did you deliver to the prodigal this amount of money? Did you credit it in any account in order to establish the payment by you of the loan? I desire to have this detail."

The Bank manager's answer, written on the same piece of paper, reads:

> "The payment of the loan account of Germana is as follows:
> On the 30th of June the loan account was debited with
> 16000 pesos, promissory note Mascuñana,
> 4000 pesos, promissory note L. Rosario,
> 5000 pesos, promissory note L. Rosario,
>
> ---
>
> 25000 pesos
> 2505 advanced on the 28th of July for maritime insurance paid to Smith Bell.
>
> ---
>
> 27,505."

There can be no doubt that the difference between what was paid for these notes and their face value was divided between the conspirators. The evidence of Rosario, the nominal endorser (Rec.,

p. 281), shows that he also was acting in co-operation with the Bank manager and Regidor. Two other willing tools were Roman Lontoc and Julio Duenas, who, according to the testimony of Ramirez, another of the gamblers, "always accompanied Francisco Martinez" (Rec., p. 235). Lontoc is dead, but Duenas himself testified to their presence on occasions when "Mr. Brown and Mr. Regidor obligated Francisco Martinez to sign the documents which were there on the table" and "shouted at him to sign the documents" and then compelled Duenas and Lontoc to sign as witnesses by the same process of vociferation (Rec., p. 240).

The next important step was the extraction from Martinez of the instrument of June 12, 1903, the basis of the second suit (Rec., pp. 49-51). This purported to provide for the payment of the following claims aggregating about 175,000 pesos, viz.:

a. Promissory notes to the Bank amounting to 110,000 pesos.
b. The Germana loan of 30,000 pesos (the basis of the first suit).
c. The "Varadero" mortgage of $13,000 U. S. currency.
d. An instrument of Nov. 29, 1902, for the payment of 9,000 pesos.

The means of payment provided was the agreement of Martinez to convey to the Bank with right of repurchase (*pacto de retro*) all the houses adjudged to him in his partition with his son, Pedro, and the whole interest in the steamer Germana, the Bank agreeing to release to Pedro the houses awarded to him, and the steamer Don Francisco, all of which had been encumbered by previous hypothecations of the defendant's half interest.

The Bank also agreed to place at Martinez' disposition, in account current, the difference in his favor between the indebtedness recited and the prices of the property in the partition, which included the Germana at a valuation of 35,000 pesos. Then follow provisions as to the time and manner in which the right of re-purchase was to be exercised. As will be shown hereafter, the recited consideration for this instrument was grossly padded, and contained duplications and re-duplications of the same item. On its face it extinguished the former pledge of the Germana and Don Francisco.

The partition between Francisco Martinez and his son was made on June 9th, 1903, immediately prior to this instrument, approved by the Court on June 13th, two days before the instrument was signed, and carried out in September, 1903 (Rec., pp. 386, 395, 429).

In May, 1903, a proceeding to place Martinez under guardianship was instituted by one Ortigas, a lawyer to whom Martinez applied for advice in connection with his difficulties with the Bank (Rec., p. 241). Apparently nothing came of this application, but in the same month of May, 1903, the plight of Martinez came to the attention of the public authorities (Rec., p. 272) and a proceeding was instituted by the prosecuting attorney of the City of Manila, in his official capacity and as next friend of Martinez, to place him under guardianship. The Bank intervened in this proceeding, thus showing that it was put upon notice at the time these transactions were going on (Rec., pp. 204, 300). This proceeding resulted in a judgment dated November 19th, 1903, declaring Martinez to be "mentally and physically incapable

and incompetent to manage his estate or care for himself," appointing a guardian of his person and property, revoking all powers of attorney formerly given by him, and enjoining all persons from interfering with his property or transacting any business with him (Rec., pp. 373-375). An application for leave to appeal from this judgment was denied (Rec., p. 376), the Trial Court being satisfied that it was inspired by the same individuals who had already "fleeced" Martinez "of many thousands of dollars of his property."

The Bank and its manager flagrantly disregarded this effort of the judicial power to take Martinez under its protection as a ward of the Court. On December 4th, 1903, over two weeks after the adjudication of incompetency, the Bank by its agent, Wolfson, with apparently no color of right whatever, took possession of the old man's property. This was admitted on the Record (p. 287). On February 12th, 1904, nearly two months after the adjudication of incompetency, Martinez was in some way induced to execute a power of attorney to Brown, the Bank manager (Deft.'s Exh. 46, Rec., p. 383), and a conveyance with *pacto de retro* of the properties referred to in the instrument of June 15th, 1903, (Deft.'s Exhibit "A," Rec., pp. 78-84). Both of these instruments were attested by Lontoc and Duenas, the ever present and every ready witnesses.

On or about March 1st, 1904, the career of Brown, as manager of the Bank, came to an end, (Rec., p. 297), fortunately both for the Bank and its depositors. He was, as stated by plaintiff's counsel (Rec., p. 92), "discharged as soon as the directors knew of his improper conduct," but not soon enough to prevent or undo the frauds

already perpetrated, and he left for parts unknown. Another year elapsed before the suits were brought.

Such, in outline, is the story; such are the facts about which there can be no serious dispute. Further details of the evidence, showing the relations of Brown the Bank manager, and Regidor, the methods by which they and their tools played upon the old man's weakness, the juggling of accounts by which a few possibly legitimate items were multiplied and expanded into the huge fictitious consideration recited in the instrument of June 15th, 1903, will all be discussed under the appropriate points of our argument.

Specification of Errors.

The Assignments of Errors in the two cases, (Rec., pp. 39-42, 106-109), are very detailed and elaborate and are identical for both appeals. Without waiving the benefit of any of these details, the errors, upon which reversal is prayed, may be more briefly summarized as follows:—

1. The Court below erred in granting a judgment in No. 80 which was not within the issues joined, or supported by the facts pleaded or proven (Assts. 1, 9, 10, 11, 14½, 26).

2. The Court below erred in granting any judgment whatever in favor of plaintiff in No. 79 (Assts. 6, 7, 8).

3. The Court below erred in reversing the Court of First Instance on the facts (Assts. 2, 3, 4, 5, 17, 19, 21, 22, 25).

4. The Court below erred in granting any relief to plaintiff and in not granting to defendant the relief which he prayed (Assts. 5, 11, 26, 27).

5. The Court below erred in not finding that at the time of the transactions involved, Martinez was incompetent (Asst. 19).

6. The Court below erred in not finding that the instruments of May 2nd and June 2, 1903, were invalid for fraud, undue influence and lack of consideration (Assts. 13, 14).

7. The Court below erred in not holding that the Bank was bound by the fraudulent acts of Brown, as its manager, and estopped to enforce instruments tainted with such fraud, of which it had notice through Brown's knowledge (Assts. 15, 16, 18, 20).

Brief of the Argument.

The appellant's position is briefly this:—Brown, as manager of the plaintiff Bank, used his position as such and the machinery of the Bank to obtain from Martinez obligations for the payment of money, and liens upon property, culminating in the instruments sued on, without paying to or for the benefit of Martinez anything but a small portion of the pretended consideration. These instruments were obtained by fraud, undue influence and threats. Martinez was at the time incompetent, and Brown knew it. The Bank is thus affected with notice both of its manager's frauds and Martinez' incapacity, and is estopped to enforce the instruments tainted therewith. The decision of the Court of First Instance on

these questions of fraud and incompetence was in accordance with the preponderance of evidence and should have been affirmed.

It is immaterial whether Regidor or Brown was the originator and inspirer of the frauds upon Martinez. Brown was an active, efficient and necessary participant, and the scheme could not have been carried out without his intervention as manager of the Bank. It is also immaterial whether Brown and Regidor or either of them induced Martinez to gamble in the first place, or took advantage of an already existing habit or propensity. It is also immaterial that some small part of the money may have passed from the Bank to Martinez upon legitimate considerations. The transactions as a whole, and the instruments growing out of them, upon which these suits were brought, were vitiated by the basic fraud, and if the Bank desires to make any claim in the nature of a suit for "money had and received" it is for the Bank to allege and prove the necessary facts.

In case No. 79 to foreclose the alleged lien on the Germana, no relief should have been granted to the plaintiff. All of the facts involved were also involved in No. 80, and the two cases were in effect consolidated. In any event, the instrument of May 3rd, 1903, affecting the Germana was wholly merged in and superseded by the instrument of June 15th, 1903, sued on in No. 80, and it was not an existing obligation at the time of the suit. Instead of a right to require a judicial sale of the Germana, the plaintiff had, if it had anything at all, a right to require a con-

veyance of the ship at an agreed price (35000 pesos) to be credited on account of the alleged indebtedness (Rec., pp. 50, 83, 425). The plaintiff cannot pick and choose among the various provisions of the instrument of June 15th, 1903, and enforce only those which it considers beneficial, evading performance by itself of those which it considers burdensome.

In case No. 80, the plaintiff sued upon the instrument of June 15th, 1903, as a mortgage, and sought to enforce it as such by foreclosure and sale. The Philippine Supreme Court held that it was not a mortgage, but a contract to sell certain property upon certain terms, and decreed partial specific performance by the defendant without any allegation or proof of performance, or tender of performance, or willingness to perform on the part of the plaintiff, and excepting from the operation of this decree the Germana, which stood, legally, in precisely the same situation as the other property involved.

The Philippine Supreme Court also failed to take into consideration that, at the time of the transactions involved, Martinez was unquestionably a weak and foolish old man, whether or not he was wholly imbecile, or legally incompetent, and that the Bank, through its agent Brown, knew this, and was thus bound to show the greatest good faith in its dealings with him. Instead of this, it appeared that the Bank had flagrantly violated the Court's order after the Court had declared Martinez incompetent and taken him under its protection, thus forfeiting all claim to any favorable consideration from a Court of Equity.

POINTS.

I.

This Court has jurisdiction of both appeals, with power to review the facts as well as the law.

Both suits are of an equitable nature and appeal is the proper method of review. No. 79 is a suit to foreclose an alleged lien upon the steamer Germana and sell the steamer in satisfaction thereof. No. 80 was brought as a suit to foreclose a mortgage upon real property and was sustained by the Philippine Supreme Court as a suit for specific performance of a contract of sale.

In No. 80 the amount awarded to the plaintiff by the Court below is 159,607.81 pesos, being equivalent to more than $75,000 in United States currency. The jurisdiction of this Court under Section 10 of the Organic Act (32 U. S. Stat. 695), is thus manifest, as this is obviously a cause "in which the value in controversy exceeds twenty-five thousand dollars."

The same ground of jurisdiction exists in No. 79. There the jurisdictional amount is made up as follows:

	PESOS.
Amount awarded to plaintiff by Philippine Supreme Court	28,599.13
Interest thereon at 8% from January 1st, 1904, to date of allowance of appeal, April 4, 1908	

(Rec. p. 44), 4 years 3 months and 3 days	9,742.76
Defendant's counterclaim for cancellation of transfer of Germana and return of vessel, valued in partition agreement participated in by plaintiff at..... (See Rec. p. 425.)	35,000.00
Defendant's counterclaim for receipts of Germana (Rec. pp. 19, 209)	3,152.52
Total	76,494.41

being equivalent to more than $37,500 U. S. currency.

It is the settled law of this Court that where the Court below has rendered a judgment in favor of plaintiff for less than the jurisdictional amount and has also dismissed a counterclaim interposed by the defendant, who seeks to review the judgment, the amount of the judgment, "and the amount sued for in the counterclaim, are in dispute" and if the two together make up the requisite amount, this Court has jurisdiction.

See Harten *vs.* Löffler, 212 U. S., 397.
Buckstaff *vs.* Russell, 151 U. S., 626.
Block *vs.* Darling, 140 U. S., 234.
Lovell *vs.* Cragin, 136 U. S., 130.
Dushane *vs.* Benedict, 120 U. S., 630.

So in case of cross appeals.

Walsh *vs.* Mayer, 111 U. S., 31.

Moreover, whether or not there was a technical consolidation of the two cases, they constitute in effect but one litigation. No 80 covers the whole field of controversy and No. 79 presents one subordinate phase, the subject matter of which is also involved in No. 80. A full review of No. 80 necessarily involves a review of No. 79 also, and in case of reversal must affect its result, since the amount adjudged due to the plaintiff in No. 80 expressly includes the amount awarded in No. 79, and the judgment in No. 80 (No. 3472 below) directs that whatever may be realized in No. 79 (No. 3471 below) from the sale of the Germana be "considered as a partial payment when realized upon the amount due in this action." Thus in case of a reversal in No. 80 complete justice cannot be done without also reversing the judgment in No. 79. The suggestion in the order below allowing the appeal in No. 79 (Rec., p. 43), that the amount there in litigation does not exceed $15,000. United States currency, fails to take into consideration the defendant's counterclaim. But the Court below nevertheless allowed the appeal upon the ground of "the connection and intimate relation which exist between both matters."

The facts are before this Court for review under the decisions in De la Rama *v.* De la Rama, 201 U. S., 303, 309, and Strong *v.* Repide, 213 U. S., 419, 429. In the latter case the rule was laid down that in the absence of a "technical finding of fact," the opinions below "may be referred to for the purpose of determining what the facts are," and that "on appeal * * * from the Supreme Court of the Philippine Islands the facts (when the Courts below differ) will be reviewed by this

Court under the tenth section of the Act of July 1st, 1902, c. 1369, 32 Stat. 691."

Moreover, there is very little real conflict of evidence. The question is rather of the inferences and conclusions to be drawn from uncontradicted evidence.

II.

The judgments of the Philippine Supreme Court were contrary to the preponderance of evidence.

These cases were decided by the Court below after the passage of Act No. 1596 of the Philippine Commission (February 25th, 1907), authorizing the Supreme Court of the Philippine Islands, where the proper motion for a new trial had been made below, to "review the evidence and make such findings upon the facts by a preponderance of the evidence, and render such final judgment as justice and equity may require."
(Act No. 1596, Phil. Com. Vol. X, War Dept. Rep., 1907, p. 91).

The Court of First Instance having held with the defendant upon the principal issues of fact involved, and the Philippine Supreme Court having held with the plaintiff and ordered judgment absolute in its favor, and each of these contrary decisions having been rendered by "a preponderance of the evidence," as viewed by the deciding

Court, the questions are entirely open for this Court to consider and determine *de novo* upon the whole record. They may be reduced to two ultimate questions of fact:

A. At the time of the transactions involved, was Martinez incompetent to make a binding contract?

B. Was the execution of the instruments sued on induced by fraud, threats or undue influence?

If either of these questions be answered in the affirmative, there must be a reversal and the other question need not be determined. If Martinez was incompetent, the contracts are unenforceable, irrespective of fraud. If the instruments were obtained by fraud or duress, they are void, irrespective of Martinez' mental condition.

A.

Martinez' Capacity.

The Court of First Instance held in No. 79 (Rec., p. 19), "that Francisco Martinez was at the time of the execution of said document sued on in this case an imbecile, and incompetent to transact this or any other business;" and in No. 80, that he was "demented," and "imbecile," and "not mentally capable of transacting business" (Rec., pp. 86, 87).

The Civil Code in force in the Philippines, provides:

> "Art. 1261. There is *no contract* unless the following requisites exist:

1. The consent of the contracting parties.

* * * *

Art. 1263. The following persons cannot give consent * * *

2. Lunatics or the insane * * *."

Hence if one of the parties to a transaction is insane, or mentally incompetent, any pretended contract arising out of the transaction is, in contemplation of law, simply non-existent.

If, then, Martinez was mentally incompetent at the time of executing the instruments sued on, they have no legal validity or existence whatever. This is a pure question of fact, upon which the two Courts below reached opposite conclusions. It must be remembered that the Trial Judge saw and heard the witnesses, and Martinez himself, and also that the evidence in the incompetency proceeding which appears in this case as an exhibit, was in fact taken before the same judge. The facts on which the Trial Court reached its conclusions, were, to a great extent, the facts out of which the litigation itself arose. The acts of Martinez in gambling away his fortune, in supinely acquiescing in Brown's and Regidor's demands for the execution of notes, checks and other instruments, without knowing their contents, and in giving a power of attorney to Cantero, a total stranger, whose appearance, according to the Trial Judge, would have been a warning to any man not deprived of sense, were so incompatible with sanity and capacity, that the Trial Court properly regarded them as conclusive evidence of incompetency (Rec., p. 86). The Philippine Supreme Court

found otherwise on the strength of the testimony of one witness (Early) "that Martinez discussed his affairs as any business man would in a rather intelligent way, and that he seemed to be rather shrewd in some respects about his business" (Rec., pp. 27, 205) and that he knew enough to settle some of the notes which he gave for gambling debts for a fraction of their face value (Rec., p. 28). That Martinez was able to *discuss* his business with some intelligence is of little importance when balanced against the fact that he conducted it with none. That he paid anything at all in settlement of his gambling debts may do credit to his "sporting spirit," but certainly does not establish his competency. Under the Civil Code:

> "Contracts without consideration or with an illicit one have no effect whatsoever. A consideration is illicit when it is contrary to law and good morals." (Art. 1275.)
>
> "The law does not permit any action to claim what is won in a game of chance, luck or hazard." (Art. 1798).

The latter article also provides that a loser cannot recover a voluntary payment, "unless there should have been fraud or should he be a minor or incapacitated to administer his property."

It is difficult to see how the partial recognition and satisfaction of an illegal and unenforceable contract is any evidence of mental capacity. Upon this issue the preponderance of evidence was manifestly with the conclusion of the Trial Court.

B.

Fraud, Threats and Undue Influence.

Even upon the assumption of the Philippine Supreme Court that Martinez was not so mentally incapacitated as to make his contract void *per se*, it is proved without contradiction that he was aged, infirm, weak-willed and foolish, a pitiful exhibition of senile decay, which has now terminated in death.

Where the enforcement of such a man's contract is sought, especially in a Court of Equity, the party seeking relief against him is held to be "bound to the utmost good faith," and even if the other's weakness of mind does not amount to absolute disqualification, fraud, intimidation or gross inadequacy of consideration is deemed a sufficient ground for setting the contract aside.

> See Griffith *v.* Godey, 113 U. S., 89, 95.
> Allore *v.* Jewell, 94 U. S., 506.

This is the test to be applied in the case at bar. Can it be maintained that the Bank, through its agent Brown, with whom alone Martinez had to do, dealt with Martinez with the "utmost good faith" or gave him adequate consideration for the contracts which it now seeks to enforce?

It makes no difference whether or not there was a prearranged plot between Brown the Bank manager, Regidor and others, to get the old man into their power and swindle him; it makes no difference whether Regidor was a tool of Brown the manager, or *vice-versa;* the important facts are that Brown the Bank manager, and Regidor, had the old man under their control and used their

power to his loss and their gain, and to the incidental profit of the Bank. Whoever first evoked or abetted Martinez' gambling proclivities, it is uncontradicted that at the time his relations with the Bank began he had gambled and was gambling, that he lost large sums of money, that his account with the Bank was used as the means of settling his gambling debts, that Brown the Bank manager knew the facts and coöperated with Regidor in a course of proceeding by which no checks were paid without Regidor's authorization, which was only given upon the payment of heavy tribute under circumstances indicating beyond doubt a division of the spoils between Brown the Bank manager, and Regidor (Rec., p. 217). It also appears that outstanding pagares or promissory notes of Martinez were bought up on behalf of the Bank for a mere fraction of their face value and then charged in full against Martinez' account (See post, p. 39). In view of the profits thus accruing to them, it is quite probable that the Bank manager and Regidor encouraged Martinez to gamble as much as possible, but that is merely matter of aggravation.

In any event, Martinez was encouraged if not practically compelled by the Bank manager and Regidor to create large obligations to the Bank, and encumber substantially his whole estate, without receiving any adequate consideration, as Brown and Regidor well knew;—a course of dealing manifestly inconsistent with the rudiments of good faith, to say nothing of the "utmost good faith," required in such a case, and clearly constituting "insidious machinations," which, under the Civil Code, render a contract void.

> See Art. 1265. "Consent given by error, under violence, by intimidation, or *deceit* shall be void."
>
> Art. 1269. "There is *deceit* when by words or *insidious machinations* on the part of one of the contracting parties the other is induced to execute a contract which without them he would not have made."

This is a broader and more inclusive category than the common law definition of fraud and is apparently intended to cover any case where an unfair advantage has been taken.

The Court below, referring to some of these transactions, said "they do not show that Martinez was in any way defrauded" (Rec., p. 31). If a bank depositor is not defrauded by a scheme whereby his checks given in payment of illegal and unenforceable obligations are held up until the payee, knowing the invalidity of his claim, pays tribute to a third party, with the certain connivance and probable participation of the Bank's manager, it is hard to imagine what would be held to constitute fraud. If the checks had not been invalid and unenforceable in the hands of their holders, and known to be so, both by their holders and by the Bank manager, there would have been no opportunity for this extortion, nor would the holders have submitted to it. The very transactions themselves sufficiently prove the guilty knowledge and participation of the Bank's manager. If he had not known that the cheques were for an illicit consideration he would have had no pretext for holding them up; knowing it, it was his duty not to use his knowledge as a means of levying blackmail on the holders, whether for the benefit of his asso-

ciate or himself or both. If the cheques were good, Martinez was entitled to have them paid in full to the payees; if they were not good, he was entitled to stop payment on them; in either event he was entitled not to have them diverted in part to a third party. The whole course of proceeding was utterly inconsistent both with regular banking methods and with common honesty. By knowingly assisting in this scheme the Bank manager defrauded Martinez, whether he shared in the plunder or not. Except as a means of accomplishing this result, the requirement of Regidor's authorization was unnecessary and absurd. Circumstances susceptible of but one reasonable explanation are as good as positive proof.

The fraud in buying up void obligations for a trifle and charging them against their maker's account in full is even more obvious. The full details of one such transaction are given hereafter under Point IV (See post, p. 39).

It is perfectly apparent from the whole story that the real object of the Bank manager in opening, and still more in extending and increasing, the credit in favor of Martinez, was to furnish a convenient system of machinery by which to facilitate the swindling of the old man, and to supply him with available funds out of which to be swindled.

The Philippine Supreme Court also held that there was no evidence of a conspiracy between Regidor and the Bank manager to defraud Martinez, apparently reaching this conclusion principally on the ground that none of the spoil was fully traced to the Bank manager's pockets (Rec. pp. 30, 31). But the argument just outlined applies equally to this point. For what conceivable

reason should the Bank manager have refused to pay cheques not rubricated by Regidor except by agreement with Regidor and to enable Regidor to levy tribute? It must have been either an innocent coincidence or a guilty conspiracy: the first inference is incredible, the second inevitable. The scene described by Duenas is also convincing proof of the joint action of the manager and Regidor. The visit of Martinez, accompanied by Duenas, to the house of Regidor; the parley between the manager, Regidor and Martinez behind closed doors, while Duenas and Lontoc stood guard without, until summoned to sign as witnesses the documents just signed by Martinez under compulsion; all these circumstances lead to but one conclusion—a concerted arrangement or conspiracy between the Bank manager and Regidor, to pluck the old man bare. Possibly Regidor was too forceful and astute a scoundrel for Brown to deal with evenly; possibly Brown never received his share of the blackmail paid to Regidor in Brown's presence; it is immaterial how far, as between themselves, there was "honor among thieves"; the fact is evident that there was a conspiracy and that Martinez was its victim.

With these two basic facts so well established, there can be little need for the Court to spend much time upon all the corroborative and cumulative details of the evidence. We shall, therefore, call attention only to some of the most striking instances of corroboration. Among these are some of the letters from the underlings, the lesser tools, of the conspiracy.

Ramirez, one of the gamblers, writes to Regidor:

"In the month of May you called me that I should work in the matter of Martinez in favor of the Bank and that the latter would recompense me very well.

* * * * * * * *

This old man if he was not able to sign the last escritura in favor of the Bank, the blame is on Cantero, who did not know how to play his part, because I have been able to bring the old man to this office three times, and Cantero shouted at him, and therefore he did not wish to sign" (Defts. Exh. 39, Rec., pp. 380, 264).

And again:

"In order that my work may be complete in this matter, I beseech you that you may give me a check for 1000 pesos because I intend to make a present to the wife of the old man and to other women who have helped in order that he might sign that which he had signed."

(Deft.'s Exh. 40, Rec., pp. 380, 264.)

And the conveniently peripatetic witnesses, Lontoc and Duenas, reveal themselves and their methods with equal frankness, thus:

"You have promised us that whenever the escritura in favor of the Bank would be signed by the old man that we should receive thousands of pesos. Not only has the escritura referred to been signed two or three times, but also the liquidation of the account with said Bank of which we have not talked as the old man has said that he has not issued checks for more than 117,000 or 119,000 pesos and as we have already signed the conformity for 149,000

pesos we should call your attention to the fact that it is not necessary for us to secure the signatures in order that after difficulties of a thousand demons we should not receive more than the small alms which you gave after accomplishing that which you and Regidor desired.

* * * * * * * *

If the escritura is not yet well done, it is not our fault as we have told you and as it has been signed two or three times by the old man and by us as witnesses."

(Deft.'s Exh. 42, Lontoc to Ramirez, Rec., pp. 381, 382, 264.)

And thus:

"As you well know that we have abandoned our own affairs in order to always accompany the old man to secure that which we desire, and as we have already done."

(Deft.'s Exh. 43, Rec., pp. 381, 264.)

Regidor's letter to the Bank manager of April 21st, 1903 (Deft.'s Exh. 10, Rec., pp. 346, 143, 144), shows how the two coöperated in handling Martinez' account as they saw fit. Regidor writes in regard to objections to a cheque for 4000 pesos given to one Papa, and adds:

"Limit yourself solely to refusing payment "of the cheque referred to, saying that it is "not current, and without giving explana- "tions."

Brown followed these instructions and refused payment, although Papa "offered to make a present of 500 pesos to cash the check," as he himself

testified (Rec., pp. 246, 247). As this was only 12½%, the tribute was apparently not large enough.

The execution of numerous counterparts of the instrument of February 12, 1904, leaving the date blank, prepared by Regidor, typewritten by Cantero, and executed by the Bank manager in his official capacity, all after the adjudication of incompetency, was one of the last acts of the conspirators, after their further spoliations were prevented by the protecting arm of the Court. (See Test. of Cantero, Rec., pp. 141-143; Deft.'s Exhs. 16-23, Rec., pp. 352-356.) Why the evident purpose to date them back, prior to the adjudication of incompetency, was not carried out, does not appear.

How closely Martinez was watched appears from Deft.'s Exh. 98 (Rec., p. 463), described by Cantero as "one of the reports on notes delivered to Mr. Regidor when he gave the commission to hunt up gambling promissory notes" (Rec., p. 155), in the handwriting of Rodriguez, who testified himself in corroboration (Rec., pp. 256, 312).

He (Rodriguez) writes:

> "On Sunday February the fifteenth, Martinez gambled and paid for what he lost with a solitaire diamond ring, which he bought last week from a broker for 1,600 pesos, paid by check on Monday the sixteenth.
>
> Find out the name in the note of 20,000 pesos for which he paid 8,000 when the American attorneys presented it to him and see if he still has a promissory note for 6,000 and two notes for 3,000 which he has also paid; they must have some connection with the promissory note for P. 20,000 referred to and paid" (Rec., p. 463).

To cover their tracks as much as possible, the Bank manager addressed to Cantero his letters actually intended for Regidor and Regidor signed the initial "C" to his communications to the Bank manager (See Deft.'s Exhs. 102, 103, Rec., pp. 465, 466, and Test. of Contero, Rec., p. 156).

The history of these damning documents is interesting. First they were kept in a safe of which Regidor had the key; when the incompetency proceeding was brought, they were spirited away by putting them in Cantero's trunk, and taking them to the house of Azaola, a notary before whom many of the instruments were executed, and who was apparently one of the conspirators; then to the house of Vergarda, then back to Regidor's, where Cantero lived; then (on June 30, 1904) Gallegos, who shared Cantero's room, took the trunk away, and under orders from the Prosecuting Attorney brought it to his office, where it was opened in the presence of counsel for the Bank and for Martinez, and its contents examined and initialed (Test. of Cantero, Rec., p. 135; of Gale, Rec., p. 272).

The chief conspirators themselves joined in recording their self-crimination. Defendant's Exhibit 12 (Rec. p. 349) is a memorandum dictated by Regidor, typewritten by Cantero, and personally delivered to Brown the Bank manager at Regidor's house (Rec. p. 138). This was dated December 23, 1903, after the adjudication of incompetency. It directs the Bank manager how to doctor the books of the Bank, so as to lend as much plausibility as possible to the record of the transactions. It was acted upon a few days later, December 31st, 1903 (Rec., p. 120). Defendant's Exhibit 4 (Rec., p. 343) has already been com-

mented upon in our opening statement of facts. (See ante, p. 10.) It is sufficient by itself to show the fact and the essential methods of the conspiracy. One of the notes referred to in this memorandum is proved to have been endorsed to the Bank under circumstances absolutely negativing the idea of actual payment. The endorser, Rosario, testified: "Mr. Regidor asked me as a favor that these pagares should be endorsed to me and that I should then endorse them to the Bank" (Rec. pp. 281, 357). These notes were given in renewal of a former void note for 24,000 pesos purchased by Regidor for 1,000 pesos (Rec. p. 231).

So far from there being no competent proof of the fraud and conspiracy, it is very rare that so much first hand documentary evidence of so dark and devious a fraud is created and preserved by the conspirators or found by the officers of justice.

Other phases of the conspiracy by way of fraudulent padding of the nominal consideration of the contracts sued on will be further discussed under Point .

The proof of intimidation has already been outlined (See ante, pp. 9, 11, 29) and need not be repeated in detail. There is ample and uncontradicted evidence that Martinez executed his obligations to the Bank under duress of threats, shouted by the Bank manager (Brown), Regidor and Cantero, that they would "throw him out of the window" or "send him to Bilibid," if he did not comply with their demands. A contract so executed is legally non-existent.

The Civil Code provides:

"Art. 1265. Consent given by error, under violence, by intimidation, or deceit shall be void.

Art. 1267. * * * Intimidation exists when one of the contracting parties is inspired with a reasonable and well-grounded fear of suffering an imminent and serious injury to his person or property * * *.

In order to classify the intimidation, the age, sex, and status of the person must be considered.

* * * * * * *

Art. 1268. Violence or intimidation shall annul the obligation, even if it should have been employed by a third person who did not take part in the contract."

In the case at bar we have uncontradicted and corroborated evidence of threats of immediate physical violence and criminal prosecution, employed by a numerous band of scoundrels against one helpless old man almost if not quite in his dotage. On this ground also the contracts sued on are absolutely void.

III.

The Bank is affected by the frauds of Brown its manager and by his knowledge of the invalidity of the instruments in suit.

Brown was the local manager in Manila of the plaintiff Bank, a Connecticut corporation. So far as the defendant Martinez was concerned, *Brown was the Bank.* It was for the Bank's interest and profit to get accounts, and to discount paper, and it was Brown's function as manager to get such business for the Bank. In all his dealings with Martinez and Martinez' account. Brown acted as the representative of the Bank, and it was only through Brown's official position and powers that the fraud was posible. As the agent of the Bank he had power to and did refuse payment of Martinez' cheques until the requisite tribute was paid to his confederate Regidor; as the agent of the Bank he intimidated Martinez into executing the various obligations to the Bank; by suing on these instruments the Bank has ratified and adopted its manager's transactions with Martinez, and the fraud with which they are tainted is a complete defense as against the Bank. Regidor also acted as the agent and representative of the Bank in investigating Martinez' solvency and in preparing the instruments executed by Martinez. If the money had actually passed to Martinez' physical possession and he had departed with it, and Brown and Regidor had then attacked him on the street and taken it away from him, that might be regarded as

their individual wrong, and not attributable to the Bank. But here the Bank manager has used the Bank's machinery to perpetrate his frauds, and the Bank which put him in a position enabling him to do so is responsible.

If authority be needed for so elementary a proposition the case of United States *v.* State Bank, 96 U. S. 30, is directly in point.

There through a fraud to which the cashier of the United States Sub-treasury at Boston was a party, a large sum of money was deposited in such Sub-treasury to the credit of another party when it actually belonged to the State Bank. The Bank sued in the Court of Claims and recovered. The United States appealed. The Court said:

> "But surely it ought to require neither argument nor authority to support the proposition, that, where the money or property of an innocent person has gone into the coffers of the nation by means of a fraud to which its agent was a party, such money or property cannot be held by the United States against the claim of the wronged and injured party.
>
> The agent was agent for no such purpose. His doings were vitiated by the underlying dishonesty, and could confer no rights upon his principal.
>
> The appellee recovered below the amount claimed. A different result here would be a reproach to our jurisprudence."

If the United States could not retain money which had reached their treasury through the fraud of their agent, surely the plaintiff Bank in this case cannot be allowed to enforce alleged obligations obtained in its name through the fraud of its agent.

By suing on the obligations so obtained the Bank has adopted and ratified its agent's wrongful acts.

See Wilson *vs.* Pauly, 72 Fed., 129 (C. C. A. 6th Circ., Taft, Lurton and Severens, JJ.).

The same result is reached by applying the doctrine of notice. Brown, the Bank manager, had actual knowledge of Martinez' mental incapacity and of the frauds and "insidious machinations" practiced upon him. His knowledge was notice to the Bank, which cannot now enforce obligations the invalidity of which must have been known to the one representative through whom the Bank dealt with Martinez.

That Brown may have defrauded the Bank also does not alter the situation.

See Armstrong *vs.* Ashley, 204 U. S., 272, at p. 283.

In any view of the case, it was through Brown's hands that the Bank acted, and the fraud with which they are defiled makes it impossible for the Bank to come into equity with the "clean hands" which equity requires.

IV.

The nominal consideration for the instruments sued is to a great extent illicit and fictitious.

In his efforts to manufacture evidence of Martinez' alleged indebtedness to the Bank, the Bank manager, acting jointly and in collusion with Regidor, multiplied notes and securities to such an extent, and Martinez signed with such acquiescence whatever was presented to him, that it is difficult at the present time to unravel the tangle, and ascertain which of the notes involved are separate and original frauds and which are mere duplications and repetitions.

There are certain of the transactions, however, which can be traced through their tortuous course with some accuracy, and which will show sufficiently the true situation.

Manuel Ramirez, an accomplice of Brown and Regidor, was employed by them to look for and buy "pagares which Francisco Martinez lost in gambling" (Rec., p. 230). In April, 1903, he found a pagare of 24000 pesos in favor of one Felix Herrera, already overdue. This was then in the hands of one Mascuñana. Mr. Regidor told the holder that the pagare "was no longer of value because it was overdue and besides it had been won in gambling" (Rec., p. 231). As Martinez himself testified (Rec., p. 285), this loss was incurred at *Monte*, a prohibited game (Lichauco *v.* Martinez, 6 Phil. Rep. 594). Ramirez brought Mascuñana and Regidor together, and Regidor "purchased the note for 1000 pesos," making the payment "in his house in silver" (Rec., p. 231).

Ramirez then brought Martinez to Regidor, and "Regidor told him to renew each note, two pagares, one of 16,000 pesos and one for 8,000 pesos." These notes are defendant's exhibits 25 and 26 (Rec., pp. 357, 358). They were endorsed by Mascuñana, the nominal payee, to Rosario, and by Rosario to the Bank "as a favor," that is, without consideration (Rec., p. 281). For the 8,000 pesos pagare two separate notes for 4,000 and 5,000 pesos appear to have been subsequently substituted (See Deft.'s Exh. 12, Rec., p. 349). When it became necessary to manufacture some apparent consideration for the Germana loan on the books of the Bank, it was accounted for to the extent of 25,000 pesos by debiting these three notes against it. (Deft.'s Exh. 4, Rec., p. 344). It thus appears that the amount of the Germana loan was never paid to Martinez, but was nominally applied for the most part to take up notes for 25,000 pesos, the original consideration for which was illegal, and which were actually acquired for only 1,000 pesos.

Now, "contracts without consideration or with an illicit one have no effect whatsoever," (Civil Code, Art. 1275) and "the statement of a false consideration, in contracts, shall render them void" (Do. Art. 1276). Hence no suit can be maintained on the Germana transaction, under either of the instruments in which it figures. A false consideration is stated, and the real consideration is illicit. Where the consideration is illicit even in part, there can be no recovery unless the plaintiff proves the amount due upon a valid consideration. (Lichauco *v.* Martinez, 6 Phil. Rep. 594). Illegality of consideration is equally

a defense as against an assignee (Palma *v.* Cañizares, 1 Phil. Rep. 602).

The duplication of items began at the very inception of the relations between Martinez and the Bank. When the account was opened on January 30, 1903, with a credit of 30,000 pesos, two notes for that amount were given, one signed by Martinez alone, and one by him and his wife jointly (Rec., p. 132, Deft.'s Exh. 1, Rec. p. 342). As testified by Cantero (Rec., p. 132):

> "Mr. Regidor took charge of the same and he made Mr. Martinez believe that one of the promissory notes was torn up, and then he, in the presence of Martinez, tore off the signature of Martinez to make him believe it and a few days afterward he made him sign the same document again."

No claim appears to be made by the Bank specifically on account of this loan, so it must be inferred that it was included in and superseded by either the Germana loan for the same amount, or the loans of 110,000 pesos referred to in the instrument of June 15th, 1903. On that date the total obligations of Martinez to the Bank did not exceed 135,000 pesos, according to the plaintiffs' own evidence (Rec. p. 120). This was made up of the following items:

Account current as per pass book,	97,000 pesos
Loan account,	9,000 pesos Mexican
Loan account,	13,000 gold

The 30,000 pesos Germana loan must therefore have been regarded at that time either as included in some larger item, or as not an existing

obligation. In the face of this state of facts, the instrument of June 15, 1903, recites an obligation far greater in amount, viz:

Promissory notes,	110,000 pesos
Germana loan,	30,000 pesos
Varadero mortgage,	13,000 gold
Other loan,	9,000 pesos

These irreconcilable figures show that there must have been duplication of charges, especially in view of the manner in which the Germana loan is proved to have been juggled with on the books. Under these circumstances, it was certainly incumbent upon the Bank to prove how much money was actually paid to Martinez, or on his order for his benefit. This was not done; the only evidence of consideration, aside from the instruments themselves (shown to be at variance with the facts), was the testimony of the Bank manager who succeeded Brown after all the transactions involved were past history, and had no personal knowledge of them, and the doctored books themselves.

It may be that Martinez did receive some money himself in cash; or it may be that some was paid out on his cheques on legitimate considerations; but it is quite evident that he never received or had the benefit of anything like the amount sued for and awarded, and that the plaintiff has not borne the burden imposed by law of segregating the true and valid from the false and illicit consideration. The action of the Trial Court in dismissing the complaints was therefore the only proper disposition to make of the suits.

V.

The contract sued on in the Germana case (No. 79) is not an existing obligation.

It was recognized by the Philippine Supreme Court that the instrument of May 2nd, 1903. created no additional obligation not covered by the instrument of June 15th, 1903. But that Court failed to recognize that the instrument of May 2nd, 1903, was on the face of the papers wholly superseded and satisfied by the later instrument. The earlier instrument was a pledge of the steamer to secure a loan of 30,000 pesos with possession transferred to a depositary representing the pledgee, and with a qualified power of sale in the pledgee under the law (Civil Code, Art. 1872). The latter instrument provides for and effects an "extinction" of this former obligation and substitutes for it a sale (with right of re-purchase) of the steamer by Martinez to the Bank, at the price fixed or to be fixed in the partition, which was 35,000 pesos (Rec., p. 425). Therefore, the relief given to the Bank in No. 79, namely, a sale of the steamer, is absolutely contrary to the Bank's own agreement of June 15th, 1903, and has no legal basis. Moreover, the Germana loan was further extinguished on the books of the Bank on December 31st, 1903, by applying to it a cheque for 30,000 pesos executed by Martinez on June 21st, 1903, included in the total overdraft of 158,378.27 pesos as of June 9th, 1904, testified to by the present Bank manager (Rec., p. 115). It would seem that when an obligation has been "ex-

tinguished'' twice, it is rather too late to enforce it a third time by a judicial sale.

This is not a question of mere procedure or remedy. The Bank, by its contract of June 15th, 1903, has agreed to buy the Germana for a price which appears by reference to the partition to be 35,000 pesos, and extinguish its lien thereon of 30,000 pesos. Suppose that during the litigation the steamer has deteriorated in value. A judicial sale might produce much less than 30,000 pesos, and leave a substantial deficiency against Martinez instead of the balance in his favor shown by the later contract, which the Court below thus allows the Bank to repudiate, for no reason in law or equity disclosed by its opinion.

The Appellant is thus entitled to an absolute reversal and dismissal of the complaint in No. 79 on this one ground, irrespective of all other questions in the case, and of the result of No. 80.

VI.

The judgment awarded in No. 80 is not within the issues or justified by the facts pleaded or proved, and the plaintiff is entitled to no relief therein.

The plaintiff in its complaint in No. 80 alleged the instrument of June 15th, 1903, to be, ''in fact and in law, a mortgage given to secure the payment of the items of debt'' therein recited (Rec.,

p. 49). It appears from the barest inspection of the instrument that it has none of the characteristics of a mortgage. It is, by its express terms, an agreement for the extinction of the Bank's claims against Martinez and against the property of the "conjugal partnership of Martinez-Ilustre" by a conveyance, to be made in the future, of Martinez' individual share in such property when partitioned, to be taken by the Bank at the prices to be agreed on in the partition, with a right of re-purchase in Martinez, and the balance in his favor to be placed at his disposition in account current with the Bank (Rec., pp. 49-51).

The Philippine Supreme Court necessarily held that in legal effect this instrument was not a mortgage, but was "a promise to sell real estate upon certain terms, and contemplates a subsequent contract of sale which should contain the terms stated in this document" (Rec., p. 98). It further held that the instrument of February 12th, 1904, (void because executed after Martinez was placed under guardianship), "clearly indicates the view which the Bank had of the nature of the contract of the 15th of June, 1903," and states "substantially the real obligations which Martinez incurred by this contract," and then decreed specific performance by the execution of such an instrument, "*omitting therefrom, however, the steamer Germana*" (Rec., pp. 98, 99).

This instrument of February 12th, 1904, is found in the Record at pp. 78-84. It recites a then indebtedness of 177,000 pesos, without specifying any items. This exceeds by over 17,000 pesos the amount found due by the judgment under review. It then conveys to the Bank various properties of an aggregate agreed value of 192,-

500 pesos, including the Germana at a valuation of 35,000 pesos.

A tabular statement of these figures shows these discrepancies very strikingly:

Amount found due by judgment	159607.81	pesos
Indebtedness recited in Instrument of Feb. 12, 1904	177000.00	"
Aggregate valuation of properties	192500.00	"

This instrument of February 12th, 1904, does not include Martinez' property at Batangas covered by the instrument of June 15th, 1903 (Rec., p. 50), but not included in the partition of September, 1903 (Rec., p. 429), the value of which is therefore still unfixed. It limits the time for repurchase to May 7th, 1904, a period of less than three months, instead of the six months from the date of the future conveyance contemplated by the instrument of June 15th 1903 (Rec., p. 50). It provides that Martinez may exercise his right of repurchase by making monthly payments of 4000 pesos, and that the Bank shall extend the period for repurchase every six months, so long as the monthly payments are regularly made. If Martinez should default in the monthly payments, so that his right of repurchase lapses, then his partial payments are to be repaid to him by the Bank. This provision shows that the transaction was regarded by the Bank at the time as a satisfaction of Martinez' obligations, not as security therefor. The instrument also contains a dangerously inconspicuous provision that all obligations contracted by Martinez after June 15th, 1903, "and which

may be *in the possession* of the International Banking Corporation on this day," should be charged against Martinez' account current, thus enabling the Bank to use against him at their face value his various gambling obligations picked up at a bargain by the Bank's agents all over Manila.

The exclusion from this instrument of the Batangas property, and the further exclusion by the decree of the Germana, from the specific performance adjudged by the Court below, greatly lessens the amount to be placed to Martinez' credit by the Bank, and thus very substantially changes the mutual obligations of the parties. The decree, therefore, provides not for a specific performance of the contract sued on, but for the performance of a new and different arrangement never entered into by the parties, but carved out by the Court on its own motion. This alone surely requires a reversal in No. 80.

This is not a case where the Court has merely granted the wrong relief or too much relief. It is rather a case where the Record shows that the plaintiff is not entitled to any relief at all, even upon the most favorable view of the pleadings and evidence. A vendee cannot enforce specific performance of a contract of sale without tendering performance on his part. Here the vendee, so far from even signifying willingness to perform its obligations under the agreement, has expressly repudiated all such obligations, by declaring on the contract as a mortgage and seeking to foreclose it. The Court below did not even attempt to read into the Record any offer of performance by the Bank, nor can any such be found. Moreover

the performance decreed was purely unilateral, and performance by the plaintiff was neither required nor assumed. With no performance pleaded, proved, offered, or suggested by the plaintiff, there is surely no basis for adjudging performance by the defendant.

The future conveyance contemplated by the instrument of June 15th, 1903, was to be executed by both parties, as shown by the instrument of February 12th, 1904. The plaintiff therefore, in any event, should have tendered such an instrument as it deemed proper, already executed by itself.

The beginning of the suit cannot be regarded as a demand or tender, since the plaintiff did not thereby demand specific performance, but other relief of a different and inconsistent character. If no demand could be made on Martinez, it should have been made on his guardian, to whom also the tender of performance should have been made.

VII.

The Bank has violated the Court's orders and is entitled to no consideration.

The adjudication of Martinez' incompetency was made on November 14th, 1903 (Rec., p. 373), and the Bank had notice of the proceeding long before. All persons were forbidden by this decree

from interfering in any way with Martinez' property. It was expressly admitted on the trial that the real estate agent of the Bank took possession of Martinez' property on December 4th, 1903 (Rec., p. 297), three weeks later. This admission was subject to correction, but no other date was ever proved. On the contrary, the plaintiff's own witnesses confirmed the admission. Mr. Lahesa, an attorney for the Bank, who also intervened on behalf of the Bank in the incompetency proceeding, testified that he engaged Mr. Wolfson to take charge of the property and collect the rents (Rec., p. 299), and that two or three days after this conversation, "Mr. Wolfson began to collect the rents" (Rec., p. 302). Wolfson's own books show that the first rent collected by him was on December 5th, 1903 (Rec., pp. 307, 516). Lahesa himself was first brought into the matter by a letter of November 24th, 1903 (Rec., p. 311). Wolfson specifically admits that he knew of the judgment of incompetency, and applied for leave to appeal therefrom (Rec., p. 308). It is perfectly evident, in spite of his general denials, that he relied on getting such leave and obtaining a reversal, and in the interval simply took possession regardless of the outstanding judgment.

It also appears from the plaintiff's own exhibits that on December 17th, 1903, one Mathews "took charge of the steamer Germana as depositary appointed for this purpose by the International Banking Corporation" (Plff.'s Exh. D, Rec., p. 337). This was equally in violation of the judgment.

By the very terms of the contract of June 15th, 1903, upon which the Bank is suing, it

was not presently entitled to the possession of any of the properties affected. It was an executory contract, not an executed transfer. The Bank's action in taking possession at any time, before or after the declaration of incompetency, was simply a high handed ouster, without any justification,and the judgment of the Trial Court for a return of the possession of the property and payment of the rents and profits wrongfully collected by the Bank was wholly proper. The Bank's possession was manifestly acquired and held in bad faith, and under the Civil Code (Art. 455)

> "A possessor in bad faith shall pay for the fruits collected, and for those which the legitimate possessor could have received, and shall only have a right to be reimbursed for the necessary expenses incurred for the preservation of the thing."

Such expenses were allowed by the Trial Court in the Germana case (Rec., p. 20), but in the other case there was no evidence of the necessity of the disbursements and the Court properly gave judgment for the gross rents collected (Rec., pp. 87, 208, 209).

Summary of Appellant's Contentions.

We respectfully submit, on behalf of the appellant, that it appears from the Record of this case, and the legal principles applicable thereto:

1. That, at the time of the transactions in suit, Martinez was legally incompetent, or in any event so enfeebled mentally and physically as to be easily influenced and defrauded;

2. That the contracts or obligations sued upon were obtained from Martinez by the Bank's agent and manager by "insidious machinations," fraud and intimidation, which are imputable to the Bank and of which the Bank had notice;

3. That the consideration stated in the contracts is false, that the actual consideration was to a great extent illicit, and that the plaintiff has failed to prove to what extent the actual consideration was valid;

4. That, even assuming the contracts to be valid, the Germana contract was merged in and extinguished by the later contract, and as to that contract the plaintiff has repudiated its own obligations thereunder and is not entitled to specific performance or any other relief.

5. That the plaintiff wrongfully took possession of Martinez' property after he was adjudged incompetent, and that his estate is entitled to its return and to judgment for mesne profits.

CONCLUSION.

The judgments of the Philippine Supreme Court should be reversed and those of the Court of First Instance affirmed.

Respectfully submitted this fifth day of December, 1910.

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Supreme Court of the United States.

OCTOBER TERM, 1910.

No. 79.

MARIANO MARTINEZ, Administrator of Francisco Martinez, deceased,

Appellant,

vs.

THE INTERNATIONAL BANKING CORPORATION.

No. 80.

MARIANO MARTINEZ, Administrator of Francisco Martinez, deceased,

Appellant,

vs.

THE INTERNATIONAL BANKING CORPORATION.

APPEALS FROM THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

BRIEF IN REPLY FOR APPELLANT.

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Supreme Court of the United States,

OCTOBER TERM, 1910.

MARIANO MARTINEZ, Administrator of Francisco Martinez, Deceased,
Appellant,

vs.

THE INTERNATIONAL BANKING CORPORATION.

Nos. 79 and 80.

Brief in Reply for Appellant.

This brief in reply is submitted by leave of Court and in response to questions put by the Court upon the oral argument. It will be directed to two questions only:

A. The jurisdiction of this Court;
B. The relation of the Bank to its Manager's frauds.

A

This Court Has Jurisdiction.

The appellee questions the jurisdiction of this Court upon two grounds, claiming (1) that the

jurisdictional amount is not involved, and (2) that the judgments appealed from are not final. Neither of these objections is well founded.

In No. 80 the judgment appealed from adjudges a liability of more than 150,000 pesos.

In No. 79 the liability adjudged, with interest to the date of the allowance of the appeal, exceeds 38,000 pesos. The counter claim for the return of the Germana involves a value of 35,000 pesos. The sum of these two items is 73,000 pesos ($36,500).

The appellee's contention that there was no formal dismissal of this counter-claim by the Philippine Supreme Court is a mere quibble. That Court adjudged that the vessel be sold to satisfy the plaintiff's claim, and while a formal dismissal of the counterclaim for the return of the vessel might have been appropriate, it was unnecessary, since the vessel could not be returned to the defendant if it were sold for the benefit of the plaintiff.

There is no foundation for the appellee's assertion that the value in controversy must appear upon an inspection of the pleadings. It is quite sufficient if it appear any where in the Record, as it does in this case.

As this Court said in Elgin *v.* Marshall, 106 U. S. 578, at p. 580:

> "Undoubtedly, Congress, in establishing a rule for determining the appellate jurisdiction of this court, among other reasons of convenience that dictated the adoption of the money value of the matter in dispute, had in view that it was precise and definite. Ordinarily, it would appear in the pleadings and judgment, where the claim must be stated and determined; but where the recovery of specific

> property, real or personal, is sought, affidavits of value were permitted, from the beginning, as a suitable mode of ascertaining the fact, and bringing it upon the record. Williamson *v.* Kincaid, 4 Dall. 20; Course *v.* Stead, *id.* 22; United States *v.* Brig. Union, 4 Cranch, 216."

In this case the recovery of specific personal property, to-wit, the steamer Germana, was sought by the defendant. Its value appears from the Record in the agreement of partition, to which both the Bank and Martinez were parties, and which is, therefore, binding upon the Bank. (Rec., pp. 425, 429.) No further proof by affidavit would therefore appear to be necessary.

On the question of finality the authorities are conclusive against the appellee's contentions. In No. 79 the decree is substantially one of foreclosure and sale. Such a decree has been expressly held by this court to be final.

> See Whiting *v.* U. S. Bank, 13 Peters, 6, at page 15.

Nothing remained for the Court below to do except to carry out the judgment. The direction to sell the Germana, if the judgment was not otherwise paid, was absolute, and the sale would not even require confirmation by the Court. (Rec., pp. 32, 36.)

In No. 80 the judgment appealed from settled the whole law of the case and fixed the rights of the parties, leaving nothing for the Court below to do except of a ministerial character. The dispositive portion of the judgment was an absolute direction for the specific performance of the

agreement sued on, by the execution of an instrument in the form specified by the Court.

It was held by this Court in Thomson *v.* Dean, 7 Wall., 342, that where a "decree directs the performance of a specific act and requires that it be done forthwith," such decree is final for the purpose of appeal to this Court, even if it leaves accounts between the parties to be adjusted pursuant to the decree.

The general rule is further stated in the leading case of Forgay *v.* Conrad, 6 How., 201, at page 204, as follows:

> "And when the decree decides the right to the property in contest, and directs it to be delivered up by the defendant to the complainant, or directs it to be sold, or directs the defendant to pay a certain sum of money to the complainant, and the complainant is entitled to have such decree carried immediately into execution, the decree must be regarded as a final one to that extent, and authorizes an appeal to this court, although so much of the bill is retained in the Circuit Court as is necessary for the purpose of adjusting by a further decree the accounts between the parties pursuant to the decree passed."

To the same effect is French *v.* Shoemaker, 12 Wall., 86, at p. 98, as follows:

> "Unquestionably the whole law of the case before the court was settled by the Chief Justice in that decree, and as nothing remains to be done, unless a new application shall be made at the foot of the decree, the court is of the opinion that the decree is a final one, as it has conclusively settled all the legal rights of the parties involved in the pleadings."

A later application of the same rule is found in Hill *v.* Chicago & Evanston R. R. Co., 140 U. S., 52.

The fact that the Court directed that there be credited upon the amount adjudged due (a) the net receipts from the real estate involved in the action, and (b) the proceeds from the sale of the Germana, is immaterial, and the suggestion that these credits might reduce the value in controversy below the jurisdictional amount is groundless.

It is not to be supposed that the Germana would bring at a forced judicial sale more than its value as agreed upon in the instrument of partition, viz., 35,000 pesos. (Rec., p. 425.) The amount of the gross rents collected by the plaintiff was found by the Trial Court to be 29,281.93 pesos (Rec., p. 87). The net rents would necessarily be less than the gross rents. If both of these amounts be deducted in full from the amount of the judgment in No. 80, there would still remain an adjudicated liability of over 95,000 pesos, far in excess of the jurisdictional requirement.

The reservation to the defendant of the right to question the expenses incurred by the plaintiff in connection with its administration of the real estate (Rec., p. 99), does not derogate from the finality of the decree. Such question is purely incidental, does not affect the legal rights of the parties as adjudged by the Court, and is at most a severable question under the doctrine of the authorities above cited. The deduction of the proceeds of the sale of the Germana is obviously a purely ministerial act requiring no judicial consideration.

As pointed out in our former Brief (p. 20), and also upon the oral argument, these two cases are so inextricably connected that even if there be any technical objection to the jurisdiction in No. 79, nevertheless the review of No. 80 must necessarily involve a review of No. 79 also, and upon a reversal in No. 80 the mandate could be so framed as to prevent any injustice being done through a technical dismissal of the appeal in No. 79.

For the convenience of the Court we quote in full the section of the Organic Act, upon which is based the jurisdiction of this Court on appeal from the Supreme Court of the Philippine Islands:

> "Sec. 10. That the Supreme Court of the United States shall have jurisdiction to review, revise, reverse, modify, or affirm the final judgments and decrees of the Supreme Court of the Philippine Islands in all actions, cases, causes and proceedings now pending therein, or hereafter determined thereby, in which the Constitution or any statute, treaty, title, right or privilege of the United States is involved, or in causes in which the value in controversy exceeds twenty-five thousand dollars, or in which the title or possession of real estate exceeding in value the sum of twenty-five thousand dollars, to be ascertained by the oath of either party or of other competent witnesses, is involved or brought in question, and such final judgments or decrees may and can be reviewed, revised, reversed, modified or affirmed by said Supreme Court of the United States on appeal or writ of error by the party aggrieved, in the same manner, under the same regulations, and by the same procedure, as far as applicable, as

the final judgments and decrees of the Circuit Courts of the United States."

32 U. S. Statutes, at p. 695, quoted in De la Rama *v.* De la Rama, 201 U. S., at p. 305.

It is manifest that in these cases, upon any construction of the plaintiff's causes of action, the substantial "value in controversy" is more than twice the jurisdictional amount, and that all the substantial rights of the parties are finally determined by the judgments appealed from. The importance to the twelve million inhabitants of the Philippine Islands of the right of appeal to this Court is apparent from various recent cases in which, after long litigation, justice has been finally attained by the exercise of such right, and this recourse should not be taken away or impaired by any refined subtleties of technical procedure.

B.

The Bank cannot enforce the agreements on which this suit is brought because they were procured by the frauds of its Manager.

The essential facts in this case are not really in dispute and are altogether manifest from a reading of the record. The fraudulent acts of Brown and Regidor, by which Martinez was so completely fleeced, were fully discussed in the

former Brief and at the bar and no further commentary thereon is necessary.

The one remaining question is whether, in view of all these facts, the Bank can now come into equity with clean hands and enforce against the estate of Martinez the two agreements sued upon.

The situation of the Bank is as follows:

The International Banking Corporation, a Connecticut Company, is seeking to enforce in equity an agreement made with the administrator's intestate, Francisco Martinez, on June 15, 1903 (Rec. p. 49), by which Martinez agreed to convey to the Banking Corporation fourteen parcels of real estate, one steamer, his interest in certain other properties belonging to the conjugal partnership of Martinez and his deceased wife, and his usufruct in certain property set aside to his son. This agreement recites that it is "for the extinction of said obligations (recited in the paper), "and its (the Bank's) assistance in the "partition of the property of the conjugal part-"nership" (Rec. pp. 49, 50). The Bank obligates itself to place to Martinez's credit in account current "any excess of money which may result "in my (his) favor from the foregoing obliga-"tions" (Rec. p. 50). The Bank claimed that the instrument was in effect a mortgage and prayed its foreclosure and a judgment for any deficiency that might result from the sale (Rec. p. 49).

The Bank at the same time sought to enforce a pledge of the steamer under an earlier agreement (May 2nd, 1903), being one of the obligations which the instrument of June 15th, 1903, was designed to extinguish.

The first requisite for such an appeal to equity, is that the agreement shall have been honestly ob-

tained and that the plaintiff shall be free from any taint of bad faith in its procurement.

The contract was procured on behalf of the Banking Corporation and executed by Robert Wemyss Brown "*in his capacity* as directing "agent to (at) Manila of the International Bank-"ing Corporation, as appears from the proper "instrument of power of attorney" (Rec. p. 51).

So far from showing that this agreement procured on its behalf by its "directing agent" or general manager was founded in good faith and honestly procured, the Record shows, and the arguments together with the main brief have demonstrated, that it was the culminating step in a fraudulent and hitherto successful conspiracy between the managing agent of the corporation and others to despoil Martinez of his entire fortune.

The plaintiff seeks refuge in the plea that it is not to be made liable for the fraud of its agent, unless actual knowledge of and conscious participation in such fraud is brought home to it as a separate entity.

The first answer to this plea is that no one is seeking to impose a liability upon the Bank; the Bank is the actor, and is seeking to enforce an agreement procured in its behalf and executed by the very agent whose act in so doing it ratifies and rests upon by the present suit in equity to enforce the agreement.

The Bank cannot adopt and ratify the act of the agent in executing the agreement, and while seeking to enforce it, escape the consequence of the fraud by which the agreement was induced.

The instruments sued on being themselves the result of fraud, the Bank cannot enforce them whether or not its directors had knowledge or notice of the fraud.

But even were the administrator of the intestate Martinez seeking a recovery against the Bank, with the burden of the affirmative resting upon him to charge the Bank with the fraud through which his intestate was despoiled, (which is not the case), that affirmative would be satisfactorily sustained by the proof of the Bank Manager's fraudulent manoeuvres in procuring the agreement now in question and in all the transactions preceding it and contemporaneous with it.

The knowledge and the actual participation of the agent in the fraud which culminated in wresting from Martinez the agreement now before the Court is abundantly established; the fact is undeniable that he procured the agreement for the benefit of the Bank, within the scope of his employment as manager or "directing agent" of the business of the Bank, in sole charge of its Branch at Manila, six thousand miles from the home office of the Bank in Connecticut, and clothed with ample powers, commensurate with the necessities of a banking business to be carried on daily at a distance from the Board of Directors which rendered consultation impossible and immediate continuous action of the agent imperative.

It was suggested upon the argument that the Bank itself had suffered from the frauds of its Manager instead of deriving any illicit gains therefrom. This is not the case. The only specific evidence of the amount claimed to be due from Martinez to the Bank was that of a bank employee who entered the service of the Bank in February, 1904 (Rec., p. 116), and had no personal knowledge of the transactions involved (Rec., p. 117). The figures were made up from the books of the Bank, which as shown in

our former Brief (p. 33), were flagrantly doctored by Brown under Regidor's instructions. The checks which this witness produced and which are relied on to show the payment of money to Martinez or on his order (Rec., pp. 124-128) only amount to about 120,000 pesos, excluding from this computation the check for 30,000 pesos (Rec., p. 129), which merely transferred this amount from the loan account to the overdraft account. We have been unable to find in the Record any basis for fixing the amount of the alleged liability in No. 80 at 159,607.81 pesos, for which the Philippine Supreme Court gave judgment, except the allegation in the complaint (Rec., p. 48). There is no evidence of the actual payment of the greater part of the checks.

Since the whole transaction is tainted with the frauds of the Bank Manager, committed in his administration of the Bank's affairs, it is immaterial whether the Bank actually received any illicit pecuniary profit. But if, in any view of the case, this should be regarded as relevant, it is manifest that the Bank by a total outlay which does not appear to have been more than about 120,000 pesos, secured from this defenceless victim of senile decay obligations purporting to secure some 200,000 pesos. It is now seeking to enforce these obligations, which amount to nearly twice the fund which was actually furnished to the old man by the Bank Manager, to create a source of plunder and to make possible the whole contemptible swindle.

The legal doctrine applicable to this state of facts is not doubtful nor is it far to seek. No principal can reap profit by reason of the fraud

of its agent. It is no answer to this to say that the principal will not be charged with knowledge of the fraudulent act of the agent because the agent was not employed to commit a fraud, and will not be presumed to have disclosed his own fraud to his principal. This doctrine, while sound in its proper application, has no relevancy here. Had Brown committed an independent fraud, the Bank would in nowise have been chargeable. But, where the Manager of a Bank, by a series of fraudulent transactions creates an apparent indebtedness and uses such indebtedness for the purpose of procuring, on behalf of the Bank, contracts or transfers, such as those in question, the Bank cannot come into equity with clean hands for the enforcement of such instruments. No principal is allowed thus to take advantage of the fraud of his agent.

The procuring of the instruments in question was the act of the Bank Manager and well within the scope of his authority. Suing upon them is a ratification and approval of these instruments and consequently of every act leading up to their making.

In considering who should be made to suffer the losses consequent upon the fraudulent conduct of the Bank Manager, the established principle should be borne in mind that when one of two innocent persons must suffer by the fraud of a third, he shall bear the loss who enabled the third party to do the injury by holding him out to the world as his agent—competent and fit to be trusted, and thus warranting his fidelity and good conduct in all matters entrusted to his agency.

"It is the common question every day at "Guildhall," says Mr. Justice Buller in Fitz-

herbert *v.* Mather, 1 T. R., 16, "where one of "two innocent persons must suffer by the "fraud or negligence of the third, which of "the two gave credit?"

Lord Holt in Lane *v.* Cotton, 12 Mod., 472, 490, puts it thus:

> "For when a trust is put in one person, "and another whose interest is entrusted to "him is damnified by the neglect of such as "that person employs in the discharge of that "trust, he shall answer for it to the party "damnified."

The New York Court of Appeals commenting on this rule says:

> "The idea that the responsibility of a "principal for the frauds of his agent rests "in all cases upon the ground that he has in "some way, either actually or apparently, "authorized the fraudulent act, *or has re-"ceived the benefit of the fraud*, must be "given up. * * * This liability [for ne-"gligence] and that for fraud belong to the "same class, and rest upon the same reason. "That reason is that every person employing "an agent is under obligation to pay some "regard to the diligence, skill and integrity "of the agent he selects, and to his fitness to "perform the duties with which he is "charged."
>
> Griswold *v.* Haven, 25 N. Y., 595 (600-601).

This Court has declared the same rule:

> "It is no answer to this liability [of the "principal] to say that the act done by the "agent was of a fraudulent character, and "that the principal did not authorize the com-"mission of a fraud * * * he is liable in

> "a civil suit if the fraud be committed in the "transaction of the very business in which "the agent was appointed to act."
>
> Hoover *v.* Wise, 91 U. S. at p. 311.

The transaction of the business was the management of the bank, the securing of deposits, the opening of credits, the discounting of notes—this the manager was empowered to do; if he did it fraudulently, the Bank cannot take advantage of the fraud.

The purpose of the agreement was to get from Martinez for the benefit of the Bank property much more than sufficient to reimburse the Bank for moneys paid out supposedly to Martinez, but which in reality never reached Martinez and were largely diverted by the Bank Manager to his own use and that of his accomplices, and largely to pay notes which constituted no legal obligation against Martinez, but which were utilized by the Bank Manager as the medium of his own illicit gains through the agency of a Bank account over which he had supervision.

All this he did in the business of the Bank and for its profit as well as his own.

The well-established doctrine that notice to an agent, or the knowledge of an agent, while acting within the scope of his authority and in reference to a matter over which his authority extends, such as the agreement upon which the Bank is here suing, is imputable to the principal, properly rests upon the legal identity of the agent with the principal, rather than upon any presumptions of disclosure. The agent within the scope of his authority, is, for the time being, the principal himself, or at the least his *alter ego*.

This doctrine applies not only to principal and agent, when the principal is an individual, to the extent that the agent's knowledge of a fraud sufficient to vitiate the agreement will be imputed to the principal, but it applies with even more cogency to the agents of corporations.

The rule as applied to individuals.

Upon the general rule as applied to individuals we cite the following authorities:

> "I agree that notice to a director, or knowl-
> "edge derived by him, *while not engaged of-*
> "*ficially in the business of the bank,* cannot
> "and should not operate to the prejudice of
> "the latter. This is clear from the ground
> "and reason upon which the doctrine of notice
> "to the principal through the agent rests.
> "The principal is chargeable with this knowl-
> "edge *for the reason that the agent is substi-*
> "*tuted in his place* and represents him in the
> "particular transaction; and as this relation,
> "strictly speaking, exists only while the
> "agent is acting in the business thus delegated
> "to him, it is proper to limit it to such occa-
> "sions."
>
> Bank of U. S. *v.* Davis, 2 Hill (N. Y.), 451, per Nelson, C.J.

A note was sold by the payee thereof to the plaintiffs, Cummings & Co. The transaction was had with an agent of the plaintiffs, to whom the payee stated that the consideration of the note was the sale of a slave, who was unsound though sold as sound. Held, that this knowledge of the agent must be imputed to the principal. (Citing *Story on Agency, 140-451; Kemp* v. *Rowley, 2 An., 319; Lupin* v. *Clifton, 17 La., 158; Maurin* v. *Chamber, 16 La., 210*).

Cummings & Co. *v.* Harsabranch, 14 La. Ann., 711 [1859].

See also Fetter *v.* Field, 1 La. Ann., 80.

An action was brought by the tutrix of two minor children for the restitution of certain hypothecary rights released by their former tutor. Rowly, the owner of the property mortgaged, upon the release of the lien, mortgaged it to a third party, Coxe. The Court says:

> "The agent of Coxe was a party to the act "of the mortgage, executed before the same "officer and at the same time with the release, "and knowledge in him of the whole transac- "tion is proved beyond question, which binds "his principal."

Kemp *v.* Rowly, 2 La. Ann., 316, 319.

Where an agent sells goods knowing that the purchaser intends to use them in violation of law, his act is the act of the principal, and notice to him of any facts affecting the character of the act of sale affects the principal.

Suit *v.* Woodhull, 113 Mass., 391,

citing

The Distilled Spirits, 11 Wall., 356,

which held that if a purchasing agent was aware that certain liquors bought for his principal had been removed from a public warehouse in fraud of the revenue laws, the principal was bound by the agent's knowledge.

The Rule as Applied to Corporations.

There is good reason why this rule applies with particular force to corporations. From their very nature, the functions of a corporation can only be exercised through the medium of agents by whom or through whom all corporate executive action must be performed, and to whom all notice to the corporation must come. As a consequence notice to the agents of a corporation with reference to matters to which their authority relates is the only possible notice to a corporation and the knowledge of such agents is the knowledge of the corporation.

The rule is peculiarly applicable in the case at bar, where the Branch of the Bank at Manila was without any President or Board of Directors within six thousand miles, and was in absolute charge and control of a delegate of the corporation, entrusted with its entire and absolute management as "directing agent" (Rec. p. 51). He was, in Manila, as Counsel for the Corporation referred to him on the argument, "The Bank."

Among the authorities in support of this doctrine are the following:

Where the owner of a vessel, chartered to another, was sued by an incorporated Railroad Company for services rendered while the vessel was under such charter, the question arose whether the Railroad Company was chargeable with knowledge that the vessel had been so chartered, the Secretary of the Company being in possession of such information.

> "It is said that the knowledge of the char-
> "ter party by the Secretary of the Company,
> "and the conversations in the course of these

"transactions which passed between him and "Hoffman cannot affect the corporation.

"This proposition we cannot recognize.

"The official capacity of the Secretary, etc., "is not disputed, and the matters in which "he acted appear to have been within the "scope of his employment and in the usual "course of the Company's business *which was "of such a nature as necessarily to be con- "ducted through servants and agents,* and "impossible to be carried on in its details by "the direct action of its board of directors."

Pontchartrain R. R. Co. *v.* Heirne, 2 La. Ann. 129.

A bank cashier, acting as such and also acting as attorney in fact for a depositor, loaned the money of the bank to the depositor upon collateral which the depositor held as trustee. Held that the knowledge of the cashier was imputable to the bank, which was held responsible for the trust funds so misused.

Loring *v.* Brodie, 134 Mass. 453.

"A bank or other corporation can act only "through agents and it is generally true, that "if a director who has knowledge of the fraud "or illegality of the transaction acts for the "bank, as in discounting a note, his act is "that of the bank and it is affected by his "knowledge."

National Security Co. *v.* Cushman, 121 Mass. 490,

so quoted in *Innerarity* v. *Mercht. Nat'l Bank,* 139 *Mass.* 332, where the distinction is made that where a director deals with the bank on his own account, offering his own note for discount or ap-

plying for a loan on collateral of which he asserts the ownership, he is acting as a stranger to the bank and adversely to it, and his knowledge of his own private affairs cannot in reason be imputed to it.

This distinction, the only sound one which can ever relieve a corporation from the responsibility attaching to it through the knowledge of its directors or agents, is manifestly inapplicable to the case at bar, for the Bank manager Brown was throughout acting for the Bank in the transaction of its daily recurring business.

This is further emphasized by the following cases:

A director of the Louisiana State Bank offered the note of a third party for discount, not disclosing a condition assented to when the note was given that it should not be negotiated nor payment exacted until a certain mortgage should be raised. The Bank sued on the note; the defense was interposed of the condition on which the note was given, and the knowledge of the director was sought to be imputed to the Bank. The Court said:

> "If the knowledge of these facts had been "brought home to the president or cashier, "we would unhesitatingly say that the plain- "tiffs were bound by it, *they being the ex- "ecutive officers of the Bank, upon whom "all notices and process may be served.* But "directors are not officers of the bank, in the "proper sense of the word, *nor have they "individually any power or control in the "management of its concerns*: they act col- "lectively, and at stated times, *and have "otherwise no more to do with the general*

"management of the institution than the "other stockholders."

La. State Bank *v.* Senecal, 13 Louisiana, 525.

One Ganson, President of the New York & Erie Bank, and sole manager thereof, caused certain shares of the Bank standing in his name individually to be transferred to his name as executor, and paid for the same by his cheque as executor, the amount of which he had placed to the credit of his individual account. The shares were worthless, and suit was brought by a trustee to recover from the Bank the amount of the deposit so made. Held that the knowledge of Ganson, the President and Manager, was the knowledge of the Bank, and the Bank was held liable for the repayment of the loan.

Holden *v.* N. Y. & Erie Bank, 72 N. Y., 286.

The above case was cited and followed by the New York Supreme Court in

Merchants Nat. B'k *v.* Tracy, 77 Hun, 443 (455),

where the cashier of the Bank entered into a conspiracy with an outsider as the result of which the cashier disposed of some worthless stock in a hydraulic company and discounted for the Bank the defendant's cheques received by the conspirators upon the understanding that they were not to be used until further notice from him. The knowledge and acts and co-operation of the cashier in carrying out the fraudulent scheme were held

to affect the Bank, and a judgment against the Bank was affirmed.

CONCLUSION.

The judgments appealed from should be reversed, the steamer and the real estate returned to defendant with an accounting of profits, and the plaintiff remitted to its remedy at law to collect any moneys actually paid by it to or for the benefit of Martinez.

Respectfully submitted this Eleventh day of March, 1911.

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